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No. 84-1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

R. C. LYNNE, Executor and Personal Representative of the Estate of Jimmy Sherman Lynne, Deceased; MISSIONARY AVIATION FELLOWSHIP, INC.; DONNA LYNNE, Individually and as Parent and Next Friend of KEVIN LYNNE and KURTIS LYNNE, Minors,

Petitioners,

v.

AUSTRALIAN GOVERNMENT AIRCRAFT FACTORIES and THE COMMONWEALTH OF AUSTRALIA

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the allegedly defective design, manufacture and service in Australia by the Commonwealth of Australia of an aircraft that crashed in Indonesia, killing the pilot, caused a "direct effect in the United States" within the meaning of the Foreign Sovereign Immunities Act ("FSIA") because the pilot's survivors are United States citizens.

2. Whether the allegedly defective design, manufacture and service in Australia by the Commonwealth of Australia of an aircraft that crashed in Indonesia caused a "direct effect in the United States" within the meaning of the FSIA because the owner of the aircraft is incorporated in the United States.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California (Pet. App. B) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A) is reported at 743 F.2d 672.

JURISDICTION

The decision of the Court of Appeals was entered on September 21, 1984. A Suggestion for Rehearing En Banc was rejected on December 20, 1984. Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Pet. App. C. The key statutory provision is Section 1605 (a)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2).

STATEMENT

This case is an action in tort which was brought by petitioners against respondents for wrongful death and property damage. It arises from the alleged 1979 crash in Indonesia of a Nomad 22B aircraft manufactured, sold and delivered in Australia by the Commonwealth of Australia, which crash allegedly resulted in the death in Indonesia of the pilot Jimmy Sherman Lynne, a U.S. citizen. Petitioners are Mr. Lynne's estate; his survivors in the United States; and Missionary Aviation Fellowship ("MAF"), a California corporation with operations in Indonesia and the owner of the aircraft at the time of the crash. Respondents are the Commonwealth of Australia, which is a sovereign State, and the Australian Government Aircraft Factories ("GAF"). The GAF, which are maintained and operated directly by a department of the Government of the Commonwealth of Australia, manufacture and assemble aircraft and aircraft parts for the Commonwealth of Australia and for lease or sale to other parties. Although petitioners named the GAF as a party defendant, they are not incorporated by statute or otherwise and, under Australian law, they have no legal existence independent of the Commonwealth of

Australia (Appellant's Excerpts of Record (hereafter "R.") 35-37).

The GAF are not licensed, registered or incorporated to do business in any state of the United States. They manufacture no items, maintain no offices or warehouses, and have no bank account, telephone listings or employees in any U.S. state (R. 182-83, 190).

After negotiations in Fishermen's Bend, Victoria, Australia, the GAF agreed on or about September 30, 1976, to lease a Nomad 22B aircraft to MAF for one year with an option to purchase. MAF personnel from Indonesia informed the GAF that the Nomad 22B was to be used in Indonesia. All payments on the hire agreement were made from Indonesia and Papua New Guinea. The Nomad 22B aircraft was delivered to MAF at Avalon, Victoria, Australia (R. 36, 186).

Subsequently, the GAF agreed in Avalon, Victoria, Australia, to sell the aircraft, then located in Indonesia, to MAF. MAF paid the balance due on the purchase price of the aircraft from Indonesia. The contract of sale provided that it was to be construed in accordance with the laws of the state of Victoria, Australia and that any action arising therefrom was to be brought in the courts of that state (R. 36, 46, 187).

According to the Complaint filed by petitioners in the United States District Court for the Central District of California, Jimmy Sherman Lynne, the pilot of the Nomad 22B aircraft, died when the plane crashed in Indonesia on July 23, 1979, and the aircraft was destroyed (R. 4). The Commonwealth of Australia moved in the district court for dismissal of the Complaint on the grounds that subject matter jurisdiction was lacking under the provisions of the FSIA, that personal jurisdiction was also lacking, and that, even if jurisdiction existed, the venue was improper. The district court denied the motion to

dismiss on all three grounds. As to subject matter jurisdiction, it held that an exception to sovereign immunity had been established under the third clause of Section 1605(a)(2) of the FSIA because the crash of the allegedly defective Nomad 22B and the death of its pilot in Indonesia caused "a direct effect in the United States" with respect to the pilot's U.S. survivors and the U.S. corporate owner of the aircraft (Pet. App. B).

On respondents' request, the district court certified the matter for interlocutory appeal under 28 U.S.C. § 1292(b) to the United States Court of Appeals for the Ninth Circuit, and that court granted the permission to appeal. It then ruled that the injuries alleged in this case are indirect effects of the plane crash overseas. Hence, the "direct effect" exception of 28 U.S.C. § 1605(a)(2) was not applicable to abrogate the general rule of foreign sovereign immunity. The court thus did not reach the personal jurisdiction and venue issues (Pet. App. A-6).

ARGUMENT

Petitioners seek review in this Court of the Court of Appeals' ruling that the "direct effect" clause of the FSIA, 28 U.S.C. § 1605(a)(2), does not confer jurisdiction against the Commonwealth of Australia on the facts of this case, either with respect to the wrongful death or the property loss claims. The essence of petitioners' position is that a foreign sovereign may be sued in the United States under the FSIA in connection with any commercial activity and accident occurring abroad, so long as the plaintiff is a U.S. corporation or the survivor of a U.S. citizen injured abroad. Because Congress manifestly did not intend Section 1605(a)(2) of the FSIA to be construed in such an expansive fashion, the holding of the Ninth Circuit Court of Appeals is clearly correct. Moreover, it does not conflict with decisions of this Court or of other courts of appeals. The petition should therefore be denied.

1. The FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts. . . ." [1] Starting from the premise that a foreign state is normally immune from the jurisdiction of federal and state courts, the statute specifies limited exceptions to this general principle of immunity. 28 U.S.C. § 1604; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Petitioners acknowledge that the only possible basis for asserting subject matter jurisdiction against the Commonwealth of Australia in the circumstances of this case is the third exception to immunity listed in 28 U.S.C. § 1605(a)(2), relating to actions based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

The district court opinion in this case, upon which petitioners premise their arguments, adopted an unduly expansive and unprecedented reading of this statutory language in reasoning that the crash of the allegedly defective Nomad 22B and the death of its pilot in Indonesia caused a "direct effect in the United States" with respect to the pilot's U.S. survivors and the U.S. corporate owner of the aircraft. The district court relied on the U.S. nationality of the plaintiffs as a sufficient basis for sustaining jurisdiction over the foreign sovereign.[2] This view is patently contrary to the congressional mandate on the matter and was properly reversed by the Court of Appeals.

In applying the "direct effect" language, it is well settled that, as this Court recognized in the *Verlinden* decision, Congress intended the exceptions to immunity

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[1] H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6610 (hereafter "House Report").

[2] *See, e.g.*, Pet. App. B-9.

in Section 1605 of the FSIA to be "substantive provisions requiring some form of substantial contact with the United States."[3] Indeed, the express congressional intent, no doubt because of international comity and foreign relations considerations, is that the requisite degree of contact be one "beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff."[4] This position is consistent with international law, under which jurisdiction based solely on the nationality of the victim—the "passive personality principle"—is not accepted as a basis for jurisdiction.[5]

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[3] *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1983).

[4] House Report at 17, *reprinted in* U.S. Code Cong. & Ad. News at 6616. *See also Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 21 (1973) (statement of Charles N. Brower, Acting Legal Adviser, Department of State): "[O]ne of the principal objects of the statute is to avoid undue foreign relations problems . . . we want to be sure it is so drafted as to not raise new foreign relations problems." Congress clearly intended that the FSIA would make U.S. law consistent with international law. *McKeel v. Islamic Rep. of Iran*, 722 F.2d 582, 587-88 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 105 S. Ct. 243 (1984).

[5] *See Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. Supp. 435 (1935), *reprinted in* W. Bishop, *International Law* 553 (3d ed. 1971); Note, *Extraterritorial Jurisdiction Over Foreign States: The "Direct Effect" Provision of the Foreign Sovereign Immunities Act of 1976—Carey v. National Oil Corp.*, 13 J. of Int'l L. & Econ. 633, 646 & n.84 (1979) (hereafter *"Extraterritorial Jurisdiction"*); Note, *Foreign Sovereign Immunity—Territorial Jurisdiction—Non-Commercial Tort Exception to Foreign Sovereign Immunities Act Does Not Extend Domestic Jurisdiction To Acts Committed on U.S. Embassy Premises Abroad*, 24 Va. J. of Int'l L. 1013, 1019 (1984).

Section 30(2) of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965), which describes the circumstances under which a state has jurisdiction to prescribe a rule of law affecting foreign nationals, provides that:

[Footnote continued on next page]

2. The Court of Appeals correctly applied these precepts in applying the "direct effect" standard in this case. As to the wrongful death claim, it concluded, in reliance on its own recent decision in *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir.), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3403 (Nov. 27, 1984) (No. 84-484), and a chain of other precedents, that the injuries to the pilot's family were indirect consequences of the respondents' alleged misconduct and thus could not support the assertion of subject matter jurisdiction under the "direct effect" provision of Section 1605(a)(2) of the FSIA.

The thrust of the petition is that the Court of Appeals in this case and in *Berkovitz*, as well as the courts in *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979), and *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979), which reached similar results,[6] have all misconstrued the statutory phrase "direct effect." Petitioners urge that this common error stems largely from the courts' failure to interpret the phrase correctly in accordance with the principles set forth in Section 18 of the *Restatement (Second) of the Foreign Relations*

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[5] [Continued]

> A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.

By analogy, neither does a state have jurisdiction to enforce its laws as to a foreign state based solely on an effect on one of its nationals.

[6] *See also Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 n.35 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), in which the court found it "easy" to determine that the direct effect of an allegedly negligent act abroad that injures an American is the physical injury itself and not other consequences flowing therefrom; *Close v. American Airlines*, 587 F. Supp. 1062 (S.D.N.Y. 1984); *In re Disaster at Riyadh Airport*, 16 Av. Cas. (CCH) 17,880 (D.D.C. 1981) (R. at 251-53).

Law of the United States (hereafter "*Restatement*"),[7] as prescribed by the House Report on Section 1605(a)(2) (Pet. 10-11). Petitioners offer a lengthy but unpersuasive argument based on Section 18 of the *Restatement*.

For a number of reasons, Section 18 of the *Restatement* has not proven to be a significant help to the courts in applying the "direct effect" standard of Section 1605(a)(2) of the FSIA in the context of tort or contract actions against foreign sovereigns. First, neither subsection (a) nor (b) can be an appropriate guide because neither uses the phrase "direct effect."[8] Secondly, the "constituent elements" language which appears in both subsections (a) and (b) creates confusion because interpreting damages to be a "constituent element" of a

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[7] Section 18 provides:

> Jurisdiction to Prescribe with
> Respect to Effect Within Territory
>
> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory, and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

[8] *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1063 (E.D.N.Y. 1979); *Extraterritorial Jurisdiction*, 13 J. of Int'l L. & Econ. at 645.

In its draft revision of the *Restatement*, the American Law Institute has embraced the *Upton-Harris* interpretation of the FSIA "direct effect" test. *Restatement of the Law, Foreign Relations of the United States (Revised)* § 453 and Reporters' Note 4 (Tent. Draft No. 2, 1981).

tort action would permit plaintiffs to assert jurisdiction solely on the basis of the victim's nationality—an assertion in conflict with principles of international law, a result which the drafters of Section 18 did not desire.[9] Under the circumstances, it is not surprising that the Second Circuit's opinion in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) called the discussion of the *Restatement* in the legislative history of the FSIA "a bit of a *non-sequitur*. . . ." Nor is it surprising that the Court of Appeals did not seek to undertake its analysis of "direct effect" with reference to Section 18 of the *Restatement*.

The petition maintains that to hold that there are no "direct effects" here would render the third clause of Section 1605(a)(2) nugatory (Pet. 20). The correct application of the "direct effect" principle, however, has been well documented in a number of situations involving torts, as well as contracts. One example was given in the congressional testimony of a State Department official on the Section 1605(a)(2) exception. He suggested that discharge of emissions from a factory outside the United States (*e.g.*, in Canada or Mexico) could cause a "direct effect"—pollution—in the United States.[10] Another example appears in *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978), in which

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[9] *Extraterritorial Jurisdiction*, 13 J. of Int'l L. & Econ. at 645-47. Other problems that have been raised about the aptness of the Section 18 formulation to the "direct effect" standard include the consideration that the section deals only with legislative (and not adjudicatory) jurisdiction, and that a new "balancing" approach to extraterritorial jurisdiction has developed since the enactment of the FSIA in 1976. Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 Colum. L. Rev. 1440, 1462 n. 98, 1463-64 (1983).

[10] *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 20 (1973).

libelous articles written outside the United States were deemed capable of causing a "direct effect" in the U.S. because they had been circulated to the public here. In each of these cases, unlike the instant case, the immediate impact—or "direct effect"— of an action initiated outside of the United States occurred within the U.S. Such holdings clearly were contemplated by Section 1605 (a) (2).

3. The Court of Appeals reasoned with respect to the claim of the corporate petitioner, MAF, as it had with respect to the claims of the pilot's survivors, that subject matter jurisdiction could not be asserted under Section 1605(a) (2) (Pet. App. A-5):

> The direct effect of the alleged misconduct was the destruction of the aircraft and the loss of its use when it crashed in Indonesia. The financial loss, including the cost of replacement, which was sustained in the United States by MAF is an indirect consequence of the plane's destruction and the loss of its functional use.

In their argument to the court below (as in their petition to this Court) the petitioners took the position that a contrary result should be reached on the basis of the reasoning of the Court of Appeals for the Second Circuit in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). As the court below correctly pointed out, however, *Texas Trading* left undecided the question of whether a U.S. company injured abroad suffers a "direct effect" in the United States because of the financial repercussions of the injury (Pet. App. A-5). *Texas Trading* involved actions for breach of contract, not for tort. Under those contracts, as the Second Circuit's opinion emphasized, U.S. cement suppliers were to present appropriate documents to, and collect payment from, banks in New York. The court expressly based its

holding that there had been a "direct effect" within the meaning of Section 1605(a)(2) of the FSIA on Nigeria's failure to pay the U.S. suppliers in the United States, and declined to rule on the "open question" of whether injury to a U.S. corporation overseas constitutes a "direct effect in the United States" under the statute.

Reale International, Inc. v. Federal Republic of Nigeria, 562 F. Supp. 54 (S.D.N.Y. 1982), upon which petitioners also rely (Pet. 24), is to the same effect. The district court, following the guidelines laid down by the Second Circuit in *Texas Trading*, observed that Nigeria and the Central Bank had given "unilateral instructions to Morgan [Guaranty Trust Company of New York] to stop processing payments under outstanding, advised letters of credit." 562 F. Supp. at 56. The court, in upholding jurisdiction, then reasoned that the "breach having been engineered and implemented by instructions given by the Central Bank to Morgan," it did not need to determine whether Section 1605(a)(2) would apply in a situation "that does not involve the use of American banking resources." 562 F. Supp. at 57.[11]

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[11] *See also Exchange National Bank of Chicago v. Empresa Minera del Centro del Peru, S.A.*, No. 83 Civ. 8287 (KTD), slip op. (S.D.N.Y. Sept. 6, 1984) ("direct effect" where promissory note was to be paid in New York) and *Transamerican Steamship Corp. v. Somali Democratic Republic*, 590 F. Supp. 968, 975-76 (D.D.C. 1984) ("direct effect" where plaintiff was forced to make payments in the U.S., U.S. banks transferred funds, and plaintiff also incurred additional charges in the U.S.). *Wyle v. Bank Melli of Tehran, Iran*, 577 F. Supp. 1148 (N.D. Cal. 1983), which is cited by the petition (Pet. 25), is not authority because it is a district court decision in the Ninth Circuit that preceded the decisions of the Court of Appeals for the Ninth Circuit in the instant case and in *Berkovitz*. Although petitioners note that the district court in *In re Rio Grande Transp., Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981), held that a U.S. corporation's property loss abroad caused a "direct effect in the United States" because the corporation suffered loss of income in the U.S., respondents submit that *Rio Grande* was decided incorrectly.

The ruling of the court below that there was no "direct effect" jurisdiction for MAF's property damage claim is manifestly consistent with the congressional intent in designing the FSIA. So as to avoid undue foreign relations problems and fashion an approach consistent with international law, the Congress meant the FSIA exceptions "to reflect a degree of contact [by a foreign sovereign with the United States] beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." [12] The FSIA's "direct effects" concept would be eviscerated if Section 1605(a)(2) were construed as conferring jurisdiction over foreign sovereigns for actions undertaken anywhere in the world so long as the aggrieved party is a U.S. corporation.[13]

Finally, logic dictates that a corporation must be deemed to have suffered the "direct effect" of a property loss at the situs where the property was damaged (in this case in Indonesia), not where the entity is incorporated. This position is supported by cases involving the application of long-arm statutes to foreign defendants allegedly causing property damage abroad, in which the courts have found that the place of injury is the place where the property was damaged and not the place where the corporation is incorporated or has its principal place of business. *See, e.g., Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1063-65 (3d Cir. 1982); *Dickson v. Hertz Corp.*, 559 F. Supp. 1169, 1173 (D. St. Croix 1983).

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[12] House Report at 17, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6616.

[13] Moreover, as one court has observed, "[t]hat corporations injured in their American pocket books by commercial activities of state trading companies occurring outside the United States would enjoy greater access to the American courts than personal injury or death claimants similarly injured would seem on initial examination to present a somewhat anomalous statutory construction." *Close v. American Airlines*, 587 F. Supp. 1062, 1065 (S.D.N.Y. 1984).

4. This review of the pertinent case law demonstrates that there is neither a conflict between federal courts of appeals regarding the "direct effects" issue as it is presented in this litigation, nor an important question of federal law which has not been, but should be, settled by this Court. Rules of the Supreme Court of the United States, Rule 17.1(a), (c). Petitioners posit the alleged conflict primarily on the position taken by the Court of Appeals for the Second Circuit in *Texas Trading*, but, as we have previously discussed, no conflict exists. The Second Circuit opinion is in accord with the position taken by the Ninth Circuit here as to the claims of natural persons, and it expresses no contrary view insofar as corporate claims are concerned.

The petition asserts that the Eleventh Circuit and the Third Circuit (in addition to the Second Circuit) have adopted a position contrary to that of the Ninth Circuit here (Pet. 22-23). In *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1351 (11th Cir. 1982), the Court of Appeals for the Eleventh Circuit held "direct effects" within the meaning of Section 1605(a)(2) to have been established because the disputed letter of credit arrangement extended into the United States. This decision relied on and went no further than the *Texas Trading* decision of the Second Circuit, and does not conflict with either the holding or the rationale of the court below. In *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3rd Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982), the Court of Appeals for the Third Circuit considered claims by seamen based on the Seaman's Wage Act, 46 U.S.C. §§ 596-97, against the owner of their vessel, an instrumentality of the governments of Algeria and Libya. The question of subject matter jurisdiction turned on the applicability of a different exception under the FSIA. The court sustained jurisdiction on the basis that the vessel had sailed into a United States port and became subject to the federal wage requirements by reason of this com-

mercial activity in the United States. Again, there is no conflict with the ruling of the court below.

In sum, the federal courts of appeals have not reached different conclusions in applying the "direct effect" language of Section 1605(a)(2) of the FSIA to wrongful death and property damage claims of the type involved in this case. The court below disposed of the issues correctly and in a manner fully consistent with the appellate body of law on the subject. There is no basis for granting certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

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